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No. 91-1675

In The

Supreme Court of the United States

October Term, 1991

BERNARD A. ZARDA, SR., et al.,

Petitioners,

vs.

STATE OF KANSAS, et al.,

Respondents,

and

JERRY S. DEAN, et al.,

Petitioners,

vs.

STATE OF KANSAS, et al.,

Respondents,

On Petition for Writ of Certiorari
to the Supreme Court of the State of Kansas

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a State may require taxpayers to exhaust administrative remedies prior to filing a 42 U.S.C. § 1983 action in state court to obtain refunds of personal property taxes.

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On Petition for Writ of Certiorari
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RESPONDENTS' BRIEF IN OPPOSITION

Respondents respectfully request that this Court deny the petition for writ of certiorari seeking review of the opinions of the Kansas Supreme Court entered on February 28, 1992.

STATEMENT OF THE CASE

The basic facts in these cases are stated in the opinions below and in the petition. Petitioners, however, misstate several pertinent facts.

First, petitioners state that they were denied access to the Kansas judicial system in their efforts to secure post-deprivation tax relief in the form of property tax refunds. Pet. 3, 8. This is incorrect. In both *Zarda v. State of Kansas,* 250 Kan. 364, ____ P.2d ____ (1992) and *Dean v. State of Kansas,* 250 Kan. 417, ____ P.2d ____ (1992), the Kansas Supreme Court made it clear that plaintiffs had deprived themselves of access to the Kansas judicial system by failing to follow administrative procedures. *Zarda,* 250 Kan. at 367; *Dean,* 250 Kan. at 420. In Kansas, administrative determinations are judicially reviewable under the Act for Judicial Review and Civil Enforcement of Agency Actions (Kan. Stat. Ann. § 77-601 to Kan. Stat. Ann. § 77-627, inclusive); however, pursuant to Kan. Stat. Ann. § 77-607, subsection (a), subpart (2) a person qualifies for judicial review of agency action only after exhausting administrative remedies.

Second, petitioners state that pursuant to Kan. Stat. Ann. § 79-2005 (1991 Supp.) a tax protest must be filed when a motor vehicle is registered for a particular year. Pet. 4. This too is incorrect. Motor vehicle taxes in Kansas must be paid at the time of registration. Kan. Stat. Ann. § 79-5106. However, Kan. Stat. Ann. § 79-2005 (1991 Supp.) clearly provides that a tax protest may be filed either at the time of paying taxes or no later than December 20. See Kan. Stat. Ann. § 79-2005, subsection (a) (1991 Supp.).

Petitioners suggest that opinions issued by the State Attorney General have the force and effect of law. Pet. 3, 5, 9, 13 and 18. However, an attorney general opinion is neither conclusive nor binding. *Wulfkuhle v. Kansas Depart-*

ment of Revenue, 234 Kan. 241, 248, 671 P.2d 547, 553 (1983). Moreover, an attorney general opinion interpreting a statute is entitled to less weight than an administrative interpretation of a statute. *In re Tax Appeal of R & R Janitor Service*, 9 Kan. App. 2d 500, 503, 683 P.2d 909, 912 (1984) *rev. denied* 236 Kan. 876 (1984).

REASONS FOR DENYING THE WRIT

I. THE DECISIONS BELOW ARE CONSISTENT WITH THIS COURT'S HOLDING AND RATIONALE IN *McKESSON CORP. v. FLORIDA ALCOHOL & TOBACCO DIV.*, 496 U.S. 18 (1990).

In *McKesson* this Court stated:

> Because exaction of a tax constitutes a deprivation of property, the State must provide procedural safeguards against unlawful exactions in order to satisfy the commands of the Due Process Clause. 496 U.S. at 36.
>
> . . . .
>
> [I]t is well established that a State need not provide predeprivation process for the exaction of taxes. Allowing taxpayers to litigate their tax liabilities prior to payment might threaten a government's financial security, both by creating unpredictable interim revenue shortfalls against which the State cannot easily prepare, and by making the ultimate collection of validly imposed taxes more difficult. *Id.* at 37.
>
> . . . .
>
> *The State might, for example, provide by statute that refunds will be available only to those taxpayers paying under protest* or providing some other timely notice of complaint; execute any refunds on a reasonable installment basis; enforce rel-

> atively short statutes of limitation applicable to such actions, refrain from collecting taxes pursuant to a scheme that has been declared invalid by a court or other competent tribunal pending further review of such declaration on appeal; and/or place challenged tax payments into an escrow account or employ other accounting devices such that the State can predict with greater accuracy the availability of undisputed treasury funds. (Emphasis added.) *Id.* at 45.

In Kansas, the administrative procedure for the recovery of protested taxes is prescribed by Kan. Stat. Ann. § 79-2005 (1991 Supp.). Pursuant to Kan. Stat. Ann. § 79-2005 (1991 Supp.) valuation disputes (the complaint in *Zarda*) and mill levy disputes (the complaint in *Dean*) may be resolved in the administrative process.[1]

Kan. Stat. Ann. § 79-2005 (1991 Supp.) prescribes the following procedures:

1. The taxpayer may file a "written statement" of protest with the county treasurer either at the time of paying such taxpayer's taxes or no later than December 20. Kan. Stat. Ann. § 79-2005, subsection (a) (1991 Supp.).

2. The county appraiser is required to schedule a "formal meeting" with the taxpayer within 15 days of the receipt of the "written statement" of protest. Kan. Stat. Ann. § 79-2005, subsection (a) (1991 Supp.).

3. The county appraiser is required to notify the taxpayer and state board of tax appeals of the results of the

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[1] Kan. Stat. Ann. § 79-2005, subsection (b) (1991 Supp.) pertains to "valuation" disputes; Kan. Stat. Ann. § 79-2005, subsection (c) (1991 Supp.) pertains to "mill levy" disputes.

"formal meeting" within 15 business days. Kan. Stat. Ann. § 79-2005, subsection (a) (1991 Supp.).

4. The taxpayer may appeal the results of the "formal meeting" to the board of county commissioners or, at the taxpayer's option, appeal directly to the state board of tax appeals. Kan. Stat. Ann. § 79-2005, subsection (e) (1991 Supp.).

5. The taxpayer may appeal the decision of the board of county commissioners to the state board of tax appeals. Kan. Stat. Ann. § 79-2005, subsection (f) (1991 Supp.).

6. The state board of tax appeals is required to set a hearing on the taxpayer's appeal within 90 days after the filing of the same. Kan. Stat. Ann. § 79-2005, subsection (h) (1991 Supp.).

7. The hearing before the state board of tax appeals is conducted in accordance with the Kansas Administrative Procedure Act. K.S.A. § 79-2005, subsection (g) (1991 Supp.).[2]

8. The state board of tax appeals may order protested taxes refunded. K.S.A. § 79-2005, subsections (i) and (k) (1991 Supp.). *Cities Serv. Oil Co. v. Board of County Comm'rs*, 224 Kan. 183, 187-188, 578 P.2d 718, 721-722 (1978) (determination of the method to be utilized in the refund of taxes paid under protest is a proper administrative function of the Board to be carried out according to its orders).

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[2] The Kansas Administrative Procedure Act was approved in 1984 effective July 1, 1985 (Kan. Sess. Laws, 1984, Chapter 313, §§ 1-41). The Kansas Administrative Procedure Act is modeled after the Uniform Law Commissioners' Model State Administrative Procedure Act (1981) approved by the National Conference of Commissioners on Uniform State Laws, August 7, 1981. Ryan, *The New Kansas Administrative Procedure and Judicial Review Acts*, Journal of the Kansas Bar Association, Spring, 1985, at 54 n.1.

The state board of tax appeals is the highest administrative taxing authority in Kansas. *Wirt v. Esrey,* 233 Kan. 300, 314, 662 P.2d 1238, 1249 (1983); *Cities Serv. Oil Co.,* 224 Kan. at 187-188, 578 P.2d at 722. Any party may appear at any hearing or other proceeding before the state board of tax appeals and be heard in person or be represented by an attorney who is regularly admitted to practice before the Kansas Supreme Court. Kan. Adm. Reg. 94-2-10. The Kansas rules of civil procedure and evidence are applicable to procedures before the state board of tax appeals.[3] Discovery is permitted. Kan. Adm. Reg. 94-2-8. Subpoenas may be requested. Kan. Adm. Reg. 94-2-9. All proceedings are recorded by a court reporter, unless waived by the parties. Kan. Adm. Reg. 94-2-10. All proceedings before the state board of tax appeals are subject to judicial review. Kan. Stat. Ann. § 74-2426 (1991 Supp.).

Kan. Stat. Ann. § 74-2426 (1991 Supp.) provides that any action of the state board of tax appeals is subject to review in accordance with the Act for Judicial Review and Civil Enforcement of Agency Action (Kan. Stat. Ann. § 77-601 to Kan. Stat. Ann. § 77-627, inclusive). Judicial review is conducted by the district court except when a statute specifically provides for review of an agency action by appeal directly to the court of appeals or as otherwise provided by law. Kan. Stat. Ann. § 77-609, subsection (a).

The constitutionality of a statute may be presented as a new issue in the district court on judicial review. Kan. Stat. Ann. § 77-617; *State ex rel. Smith v. Miller,* 239 Kan. 187, 190, 718 P.2d 1298, 1301 (1986). Upon judicial review the court may grant other appropriate relief, whether mandatory, injunctive or declaratory; preliminary or final; temporary or permanent; equitable or legal. Kan. Stat. Ann.

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[3] Kan. Adm. Reg. 94-2-10.

§ 77-622, subsection (b); *Kansas Sunset Assocs. v. Kansas Dept. of Health & Environment,* 16 Kan. App. 2d 1, 3, 818 P.2d 797, 799 (1991).

This Court has held that administrative remedies are required to meet certain minimum *procedural* criteria. *Rosewell v. LaSalle National Bank,* 450 U.S. 503, 512, 522 (1981). Specifically, an administrative tax remedy is procedurally adequate if it provides the taxpayer with a full hearing and judicial determination of all constitutional objections to the tax. *California v. Grace Brethren Church,* 457 U.S. 393, 411 (1982). Clearly, as found by the Kansas Supreme Court, Kan. Stat. Ann. § 79-2005 (1991 Supp.) and Kan. Stat. Ann. § 74-2426 (1991 Supp.) meet and exceed these minimum *procedural* criteria.

In both *Zarda* and *Dean* taxpayers were not deprived of post-deprivation tax relief. Consistent with this Court's holding in *McKesson,* the Kansas Supreme Court found that the plaintiffs had not paid their taxes under protest as required by Kan. Stat. Ann. § 79-2005 (1991 Supp.) and, therefore, were not entitled to a refund of taxes already paid.[4] *Zarda,* 250 Kan. at 374; *Dean,* 250 Kan. at 427. The Kansas Supreme Court specifically found that the plaintiffs could have sought a declaratory judgment as to the constitutionality of the administrative regulation and injunctive relief without exhausting administrative remedies. *Zarda,* 250 Kan. at 371; *Dean,* 250 Kan. at 427.

II. THE DECISIONS BELOW ARE CONSISTENT WITH THIS COURT'S HOLDING AND RATIONALE IN

[4] The attorney general's opinion (90 Att'y Gen. 115) (Pet. Appendix H) spawned numerous tax protests pursuant to Kan. Stat. Ann. § 79-2005 (1991 Supp.) If the attorney general's opinion is sustained, these litigants having exhausted administrative remedies will receive motor vehicle tax refunds pursuant to Kan. Stat. Ann. § 79-2005, subsections (i) and (k) (1991 Supp.).

***FAIR ASSESSMENT IN REAL ESTATE ASSN. v. McNARY*, 454 U.S. 100 (1981).**

Petitioners argue that "confusion" exists among the states as to when administrative remedies must be exhausted prior to filing a 42 U.S.C. § 1983 action in state court. Pet. 26.

This Court in *Fair Assessment in Real Estate Assn. v. McNary*, 454 U.S. 100 (1981), created an exception to the general rule that exhaustion of administrative remedies is not a precondition to bringing suit under 42 U.S.C. § 1983.[5] In *McNary* this Court stated: "[T]axpayers must seek protection of their federal rights by state remedies, provided of course that those remedies are plain, adequate, and complete, and may ultimately seek review of the state decisions in this Court." *Id.* at 116. Justice Brennan, joined by Justices Marshall, Stevens, and O'Connor, concurred based upon the failure of petitioners to exhaust administrative remedies in each tax year for which they sought damages.

State courts have uniformly applied *McNary* and dismissed 42 U.S.C. § 1983 actions challenging state taxation schemes for failure to exhaust administrative remedies. See *Hogan v. Musolf*, 163 Wis. 1, 471 N.W.2d 216 (1991), *cert. denied* ____ U.S. ____, 116 L. Ed. 2d 773, 112 S. Ct. 867 (1992); *Nutbrown v. Munn*, 311 Or. 328, 811 P.2d 131 (1991), *cert. denied* ____ U.S. ____, 116 L. Ed. 2d 773, 112 S. Ct. 867 (1992); *Owner-Operators Independent Drivers Ass'n. of America v. State*, 209 Conn. 679, 553 A.2d 1104 (1989); *Raschke v. Blancher*, 141 Ill. App. 3d 813, 491 N.E.2d 1171 (1986); *Linderkamp v. Bismarck School Dist. No. 1*, 397 N.W.2d

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[5] See *Patsy v. Board of Regents*, 457 U.S. 496 (1982) and *Felder v. Casey*, 487 U.S. 131 (1988) (non-tax cases stating the general rule: exhaustion of administrative remedies is not required under 42 U.S.C. § 1983).

76 (N.D. 1986); *Zizka v. Water Pollution Control Authority*, 195 Conn. 682, 490 A.2d 509 (1985); *Stufflebaum v. Panethiere*, 691 S.W.2d 271 (Mo.banc 1985); *Johnson v. Gaston County*, 71 N.C. App. 707, 323 S.E.2d 381 (1984), *rev. denied* 313 N.C. 508 (1985); *Spencer v. South Carolina Tax Com'n*, 281 S.C. 492, 316 S.E. 2d 386 (1984).

Petitioners urged the Kansas Supreme Court to follow *Hogan v. Musolf*, 157 Wis. 2d 362, 459 N.W.2d 865 (1990), wherein the Wisconsin Court of Appeals had refused to "read McNary as creating any limitation of sec. 1983 actions in state courts." 157 Wis. 2d at 375 n.9. The Kansas Supreme Court noted the case, but rejected its reasoning. *Dean*, 250 Kan. at 424. Apparently, the Kansas Supreme Court was not aware that on June 26, 1991, the Wisconsin Supreme Court reversed the Wisconsin Court of Appeals and held that plaintiffs in a 42 U.S.C. § 1983 action were required to exhaust state tax administrative remedies. *Hogan v. Musolf*, 163 Wis. 2d 1, 471 N.W.2d 216 (1991) *cert. denied* ___ U.S. ___, 116 L. Ed. 2d 773, 112 S. Ct. 867 (1992).

Thus, there is a total lack of authority for the proposition that the exhaustion of plain, adequate and complete state administrative remedies is not required as a prerequisite to filing a 42 U.S.C. § 1983 action in state court to recover taxes. Clearly, there is no conflict among state courts on this issue and, for that reason, it would be inappropriate to grant the petition for certiorari. Moreover, petitioners reliance on *Patsy v. Board of Regents*, 457 U.S. 496 (1982) and *Felder v. Casey*, 487 U.S. 131 (1988) is misplaced because neither were state tax cases.

III. THERE IS NO BASIS FOR THIS COURT TO REVIEW ALLEGED CONFLICTS BETWEEN *WILL v. MICHIGAN DEPT. OF STATE POLICE*, 491 U.S. 58 (1989) AND *McKESSON CORP. v. FLORIDA ALCOHOL AND TOBACCO DIV.*, 496 U.S. 18 (1990).

Below respondents argued that *Will v. Michigan Department of State Police,* 491 U.S. 58 (1989) barred petitioners' claims for monetary damages. However, the Kansas Supreme Court did not address this issue in either *Zarda* or *Dean.* Consequently, a writ of certiorari to the Kansas Supreme Court to resolve any supposed conflict between *Will* and *McKesson* would be inappropriate.

IV. PETITIONERS HAVE NOT SHOWN THAT A CLASS ACTION PROCEDURE IS CONSTITUTIONALLY REQUIRED IN STATE TAX CASES.

Petitioners argue that Kansas administrative remedies are not "full and adequate" or "clear and certain" because class action procedures are not available.[6]

Several federal courts have rejected the argument that state procedures are inadequate under 42 U.S.C. § 1983 because class action procedures are not available in state tax cases. *Melof v. Hunt,* 718 F. Supp. 877, 884-885 (M.D. Ala. 1989); *Waldron v. Collins,* 788 F.2d 736, 738 (11th Cir. 1986), *cert. denied* 479 U.S. 884 (1986), *Coleman v. McLaren,* 631 F. Supp. 749, 762 (N.D. Ill. 1985), *aff'd* 796 F.2d 477 (7th Cir. 1986); *Miller v. Bauer,* 517 F.2d 27, 32 (7th Cir. 1975); *Mandel v. Hutchinson,* 494 F.2d 364, 367 (9th Cir. 1974); *Bland v. McHann,* 463 F.2d 21, 28 n.24 (5th Cir. 1972), *cert. denied* 410 U.S. 966 (1973). Petitioners have not cited a single case stating a different rule.

The general rule is that an action to recover taxes alleged to have been illegally assessed should not be maintained as a class action. 59 Am. Jur. 2d, *Parties,* § 51, p.

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[6] Arguably, class action procedures are available before the state board of tax appeals. Kan. Adm. Reg. 94-2-10 requires the state board of tax appeals to apply the Kansas rules of civil procedure. Kan. Stat. Ann. § 60-223 of the Kansas rules of civil procedure provides for class actions.

454. Where a statutory scheme for protesting taxes provides a complete, adequate and speedy remedy, the district court is without jurisdiction to grant equitable relief in the nature of a class action to all similarly situated taxpayers. See, e.g., *County Tax Levy By Box Butte County,* 220 Neb. 897, 374 N.W.2d 235 (1985); *Charles v. Spradling,* 524 S.W.2d 820 (Mo.banc 1975); *Hansen v. County of Lincoln,* 188 Neb. 461, 197 N.W.2d 651 (1972), *supplemental opinion* 188 Neb. 798, 197 N.W.2d 655 (1972) ("[A] suit cannot be maintained by one taxpayer on behalf of himself and others similarly situated to recover back taxes alleged to have been illegally assessed. In such case each must bring an action on his own behalf."); *Hooks v. Comptroller of Treasury,* 265 Md. 380, 289 A.2d 332 (1972).

Unlike other areas of law such as securities fraud, antitrust and tort claims arising out of common disasters, utilization of the class action device for the adjudication of tax issues has been minimal. The detailed conditions precedent to the maintenance of a tax refund suit would normally preclude employment of the class action in this area. 3B *Moore's Federal Practice,* ¶ 23.02[2.-23]. In *Agron v. Illinois Bell Telephone Company,* 325 F. Supp. 487 (N.D. Ill. 1970), *reversed on other grounds* 449 F.2d 906 (7th. Cir. 1971), *cert. denied* 405 U.S. 954 (1972), plaintiff's allegation that he filed an administrative tax refund action on behalf of himself and all other class members was rejected as insufficient for failure to name the claimants and the amounts due to each.

Most courts which have addressed the issue have either held that a class action lawsuit cannot be used to challenge taxes or that exhaustion of administrative remedies is a prerequisite to class certification in a tax case. *Bischoff v. City of Newport,* 733 S.W.2d 762 (Ky. App. 1987) (an action for a refund of taxes paid may not proceed as a class action; furthermore, the taxpayer must exhaust administrative remedies before seeking a refund judicially);

Hoffman v. Colo. State Bd. of Assessment, 683 P.2d 783 (Colo.banc 1984) (the district court erred in allowing plaintiffs to bring a class action without plaintiffs and class members exhausting administrative remedies provided by the legislature; taxing power is exclusively a legislative function; where the legislature has provided a complete, adequate and speedy statutory remedy for alleged tax irregularities, a taxpayer must exhaust them); *Schoderbek v. Carlson,* 113 Cal. App. 3d 1029, 170 Cal. Rptr. 400 (1980) (plaintiffs in a class action against county officials challenging a property tax lacked standing where they failed to allege that they had exhausted administrative remedies even though plaintiffs argued they should be excused from exhausting administrative remedies because they represented approximately 138,000 homeowners and the court should not require 138,000 homeowners to go through the expense of pursuing their administrative remedies; an injunction, declaratory relief and a writ of mandate were not available when a taxpayer has an adequate remedy at law—a claim for refund followed by a suit for refund); *Conklin v. Town of Southhampton,* 141 A.D.2d 596, 529 N.Y.S.2d 517 (1988) (class action certification is inappropriate in a case where governmental actions are involved and subsequent plaintiffs will be protected under the doctrine of *stare decisis*); *Aronson v. Commonwealth,* 401 Mass. 244, 516 N.E.2d 137 (1987) (class action bypassing administrative remedies to obtain refunds of substantial amounts of money on behalf of numerous unidentified taxpayers should not be allowed).

The theory behind these cases holding that a class action cannot be maintained to recover taxes illegally assessed is that each aggrieved class member has a "complete, adequate and speedy" remedy to contest taxes. Tax cases are unique and individualized—each case can be handled and resolved independently of all others without adversely affecting any other taxpayer's right to relief.

Since at least 1958, class actions to recover taxes not paid under protest have not been allowed in Kansas. *Felton Truck Line v. State Board of Tax Appeals,* 183 Kan. 287, 327 P.2d 836 (1958). *Felton* was applied in *Zarda* and *Dean. Zarda,* 250 Kan. at 369-371; *Dean,* 250 Kan. at 425-426. Petitioners have made no showing that a different rule is required under 42 U.S.C. § 1983.

CONCLUSION

In *Zarda* and *Dean* the Kansas Supreme Court decided no important questions of federal law which in any way conflict with applicable decisions of this Court. Nor, did it decide a federal question in a way that conflicts with the decision of another state court of last resort or of a United States Court of Appeals. The Kansas Supreme Court simply applied long-standing Kansas case law requiring the exhaustion of administrative remedies in state tax cases. See *Tri-County Public Airport Authority v. Board of Morris County Commissioners,* 233 Kan. 960, 666 P.2d 698 (1983); *State ex rel. Smith v. Miller,* 239 Kan. 187, 718 P.2d 1298 (1986); and *Board of Osage County Comm'rs v. Schmidt,* 12 Kan. App. 2d 812, 758 P.2d 254 (1988). For these reasons, it is respectfully submitted that the petition for writ of certiorari be denied.

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